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RE MOHD TAJUDDIN MOHD JALI, EX P PERWIRA HABIB BANK MALAYSIA BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[BANKRUPTCY NO: 29-3099-93]
b 3 NOVEMBER 1998

BANKRUPTCY: *Interest - Arrears of interest - Whether claim in excess of 6-year limitation period - Limitation Act 1953, s. 6(3)*

c ***BANKRUPTCY:*** *Notice - Claim more than debt due - Whether notice valid - Bankruptcy Act 1967, proviso (ii) to s. 3(2) - Whether debtor disputed claim within time allowed*

The Deputy Registrar had dismissed the judgment debtor's Notice of Intention to oppose the creditor's petition and made an adjudicating and receiving order d against the judgment debtor ('JD'). Hence, the instant appeal by the JD.

The JD disputed the amount of interest claimed on the judgment sum in the Bankruptcy Notice ('BN'). It was submitted that the judgment creditor ('JC') had claimed for interest in excess of the 6-year limitation period under s. 6(3) of the Limitation Act 1953.

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The JC claimed that the BN was not invalidated as proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 stipulates that a bankruptcy notice shall not be invalidated by reason only that the amount claimed therein exceeds the amount actually due unless the debtor gives notice within the time allowed for payment f that he disputes the amount so claimed.

Held:

[1] The default rate of interest was claimed since 1 January 1986 even though judgment was obtained against the judgment creditor only on g 5 June 1989. Time for the purposes of the limitation period in respect of the arrears of interest in the 2nd limb of s. 6(3) would have commenced on 1 January 1986 and expired on 31 December 1991. However, the BN claimed for arrears of interest from 1 January 1986 to 6 December 1993. That was in excess of the 6-year period from h 1 January 1986 to 31 December 1991. As such, the BN was bad in law.

[2] Alternatively, by using the method of calculating 6 years backwards from the date of the BN, *ie*, 6 December 1993, the operative date would be 6 December 1987. No arrears of interest would be recoverable before the said operative date.

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[3] The act of recovery was taken long after the expiry of 6 years. The rate of interest was the default rate of 14.25% with effect from 1 January 1986 whilst the judgment was obtained on 5 June 1989. Since the JC decided to sue or claim the default rate of interest, the JC must bear the consequences thereof.

[4] The JD had filed the Notice of Intention to oppose the creditor's petition pursuant to r. 117 of the Bankruptcy Rules 1969. In the circumstances, the JD had a right to be heard. Further, if such a debt was not enforceable at the time when the BN was issued, then an act of bankruptcy might not have been committed by the JD.

[4a] Section 6(3) of the Bankruptcy Act 1967 provides, *inter alia*, that "if the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy, the court may dismiss the petition." The court has a duty to ascertain the petitioning debt or the act of bankruptcy. It is for that reason that the court must have before it all available evidence before the court can come to a just conclusion of the case.

[5] On the foregoing reasons, the BN was invalid.

[Appeal allowed; order of Deputy Registrar set aside with costs.]

Case(s) referred to:

Malaysian Soil Investigation Sdn Bhd v. EMKO Holdings Sdn Bhd [1994] 1 CLJ 267 ***(refd)***

Re Ernest Cheong Ex-parte UMBC, High Court, Kuala Lumpur (Commercial Division) D5-29-220-1996 ***(refd)***

Re Ngan Ching Wen, ex p Moscow Narodny Bank Ltd [1996] 2 CLJ 943 ***(refd)***

Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd [1989] 3 MLJ 508 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(2) proviso (ii), 6(3), 131
Bankruptcy Rules 1969, r. 117
Limitation Act 1953, s. 6(3)

For the judgment debtor/appellant - Rajinder Singh (Tahiyub Khan with him); M/s Tahiyub Khan Othuman & Co
For the judgment creditor/respondent - Michelle Wong; M/s Raja Darryl & Loh
For the official assignee - AV Nadeson

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal against the decision of the learned deputy registrar who had on 25 November 1997 dismissed the judgment debtor's notice of intention to oppose the petition and made an adjudication and receiving order against the judgment debtor.

Issues For Decision

The issues for decision are as follows:

1. Whether s. 6(3) of the Limitation Act 1953 prohibits the charging of interest on a judgment debt after the expiration of six years from the date the interest became due?

2. Whether the judgment debtor is prevented from raising this issue in view of proviso (ii) to s. 3(2) of the Bankruptcy Act 1967?

Submission For The Judgment Debtor

According to the bankruptcy notice in encl. (3), the judgment creditor has claimed against the judgment debtor, interest with effect from 1 January 1986 at the rate of 14.25% per annum, calculated on a daily basis, until 6 December 1993, the day on which the bankruptcy notice was issued. The amount of interest claimed against the judgment debtor is RM5,307,012.18 bearing in mind that the judgment sum is only RM2,556,610.35. The bankruptcy notice contains an element of interest which is 23 months in violation of s. 6(3) Limitation Act 1953, in that, according to the Limitation Act, such interest cannot be recovered after six years from the date in which the interest became due.

It is further submitted that, according to the judgment against the judgment debtor stated in the bankruptcy notice, interest became due against the judgment debtor from 1 January 1986, and hence on 1 January 1992, the limitation period would have set in, thereby forbidding the judgment creditor from recovering the interest for the period of 1 January 1992 till 6 December 1993 against the judgment debtor. The amount of excessive interest being recovered against the judgment debtor is approximately in the region of RM750,000 calculated on an average basis.

Submission For The Judgment Creditor

It is submitted for the judgment creditor that s. 6(3) of the Limitation Act 1953 applies only to "actions upon a judgment" and has nothing to do with matters pertaining to "the execution of a judgment", and that the former usually refers to a situation where one sues on a judgment which cannot be enforced in any other way, e.g., a foreign judgment from Taiwan. That being the case, s. 6(3) does not apply to the enforcement of interest pursuant to a local judgment, as is the fact in the instant case. There is no limitation on the interest which can be charged under the judgment. Further, s. 6(3) does not prohibit the payment of arrears of interest due on a judgment beyond six years after the interest becomes due, as long as the act of recovery is made before the expiry of the 6-year period.

Decision Of The Court

Statement Of Account In Bankruptcy Notice

For the purpose of completeness, it is necessary to reproduce the statement of account in the judgment creditor's bankruptcy notice in encl. (3) as follows:

Judgment sum	RM2,556,610.35
Interest on the said sum of RM2,556,610.35 at the rate of 14.25% per annum calculated on daily outstanding balance at monthly rests from 1.1.86 to 6.12.93	RM5,307,012.58
Less Payments made	RM 10,500.00
Costs adjudged	RM 350.00
Total amount owing as at 6.12.93	RM7,853,472.93

Judicial Interpretation Of s. 6(3)

Section 6(3) of the Limitation Act 1953 reads as follows:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and **no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from which the interest became due**.

It is the second limb of s. 6(3) of the Limitation Act 1953 which requires judicial interpretation in the instant case. In *Malaysian Soil Investigation Sdn Bhd v. EMKO Holdings Sdn Bhd* [1994] 1 CLJ 267, Abdul Malek Ahmad J (now FCJ) held that while s. 6(3) does not prohibit the payment of arrears of

interest due on a judgment debt beyond six years after they become due, the act of recovery must be made before the expiry of the prescribed six years.

In *Re Ngan Ching Wen, ex p Moscow Narodny Bank Ltd* [1996] 2 CLJ 943, James Foong J held, *inter alia*, that no interest could be recovered in violation of s. 6(3) and that the court could use the method for the purpose of deciding when interest becomes due by taking the date of bankruptcy notice and calculating six years backwards.

In *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1989] 3 MLJ 508, Edgar Joseph Jr J held that there was an element of interest recovery which was barred by s. 6(3) of the Limitation Act 1953, namely a trifling sum of interest in respect of a period of two months, but the learned Judge in that case went on to dismiss the judgment debtor's application as His Lordship considered the defect which could be condoned under s. 131 of the Bankruptcy Act 1967. In *Re Ernest Cheong Ex-parte UMBC*, High Court Kuala Lumpur (Commercial Division) D5-29-220-1996, Kamalanathan Ratnam, JC (now J) agreed with the decision of Edgar Joseph Jr J in *Wee Chow Yong, supra* that the six-year period in the second limb of s. 6(3) starts from the day the interest was due and not from the date of judgment.

In the present case before me, the default rate of interest has been claimed since 1 January 1986, even though judgment was obtained against the judgment creditor only on 5 June 1989. Following the decision of Edgar Joseph Jr J (now FCJ) in *Wee Chow Yong, supra*, and of Kamalanathan Ratnam JC (now J) in *Re Ernest Chong, supra*, time for the purposes of the limitation period in respect of the arrears of interest in the second limb of s. 6(3) would have commenced from 1 January 1986 and would have expired on 31 December 1991. The bankruptcy notice before me, has included a claim on the arrears of interest from 1 January 1986 to 6 December 1993, which is in excess of the six-year period from 1 January 1986 to 31 December 1991 and is therefore in my view bad in law.

Alternatively, by following the decision of James Foong, J in *Ngan Ching Wen, supra*, that the method used for the purpose of deciding when interest becomes due is by calculating six-years backwards, commencing from the date the bankruptcy notice is dated. In the case before me, the bankruptcy notice was dated 6 December 1993. Hence, by calculating six years backwards commencing 6 December 1993, the operative date would be 6 December 1987. In the circumstances, no arrears of interest would be recoverable before the operative date of 6 December 1987. It is true that the judgment debtor has paid an amount of RM10,500 to account, but such payment did not wipe out the arrears of interest, *ie*, RM5,307,012.58 claimed by the judgment creditor

for the period from 1 January 1986 to 6 December 1993, which went beyond the six-year limitation period prescribed in the second limb of s. 6(3).

The respondent's ('judgment creditor's') learned counsel has placed emphasis on the words "An action upon any judgment" and illustrated by referring to, e.g., a judgment from a Taiwan court. This submission, with the utmost respect, is purely academic and far detached from the facts of this case. Further, it falls outside the ambit of the Reciprocal Enforcement of Judgments Act 1958. Learned counsel for the respondent has suggested that s. 6(3) has been so interpreted as not to prohibit the payment of interest due on a judgment beyond six years after they become due as long as the act of recovery is made before the expiry of the six-year period. Although this submission appears to be in line with the High Court decision in *Malaysian Soil Investigation Sdn Bhd v. EMKO Holdings Sdn Bhd, supra*, in the case before me, the act of recovery was taken long after the expiry of six years and the rate of interest was the default rate of 14.25%, with effect from 1 January 1986, whereas the judgment was obtained on 5 June 1989. Since judgment creditor herein decides to sue or claim the default rate of interest, then the judgment creditor must bear the consequences thereof. (See Kamalanathan Ratnam JC (now J) in *Re Ernest Chong, supra*).

Proviso (ii) To S. 3(2)

It has been further argued for the judgment creditor that pursuant to proviso (ii) to s. 3(2), the bankruptcy notice is not invalidated.

Proviso (ii) of s. 3(2) ('the said proviso') reads as follows:

> Provided that a bankruptcy notice …
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> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; … .

In the instant case, the judgment debtor has filed the notice of intention to oppose the creditor's petition pursuant to r. 117 of the Bankruptcy Rules 1969. In the circumstances, in my view the judgment debtor has a right to be heard: *Re Ngan Ching Wen ex p Moscow Narodny Bank Leo, supra*. Further, if such a debt is not enforceable at the time when the bankruptcy notice was issued, then an act of bankruptcy may not have been committed by the judgment debtor. Indeed, the fundamental question is whether an act of bankruptcy has been committed by the judgment debtor.

Section 6(3) Bankruptcy Act 1967 provides, *inter alia*, that "if the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy, the court may dismiss the petition.".

The court has a duty to ascertain the petitioning debt or the act of bankruptcy and it is for that reason the court must have before it all available evidence before the court can come to a just conclusion of the case.

Conclusion

On the foregoing reasons, I hold that the bankruptcy notice is invalid. I therefore allow this appeal and set aside with costs the order made by the learned registrar on 25 November 1997.